No. 22,801

IN THE

United States Court of Appeals

For the Ninth Circuit

NEILA A. AUTENRIETH, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLANTS

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I

JURISDICTION

This is an appeal from the Order of his Honor, Alfonso J. Zirpoli, United States District Judge for the Northern District of California, dismissing the Complaint (TR 59, 60) and entering a judgment of dismissal on February 29, 1968 (TR 61).

The United States District Court had jurisdiction of the issues raised by the

> "Complaint for Declaration of Plaintiff's Civil and Other Constitutional Rights and All Orders necessary to Enforce the Same" (TR 1-23)

under the Constitution and the laws of the United States and the treaties presently in force; under the Civil Rights Act, 28 USC Sec. 1343; 28 USC 1331 (a), 1333 (1), 1340, 1343 (3) (4) and 28 USC Sec. 1651 (a) and (b); Rule 23 of the Federal Rules of Civil Procedure. Jurisdiction is further claimed under various treaties such as 46 Stat. 2343, 32 Stat. 1779, 59 Stat. 1031, 59 Stat. 1055, 61 Stat. 1218, 59 Stat. 1544, and the Universal Declaration of Human Rights (U.N. Document a/811 in force December 16, 1958).

This Court has jurisdiction of this appeal under 28 USC 1291 and 1294.

II

STATEMENT OF THE CASE

The Complaint was filed on October 12, 1967, on behalf of 82 Plaintiffs (TR 1, 21, 22) and it was presented as a class suit on behalf of all other similarly situated Plaintiffs not named (TR 3, 4). Subsequently, an amendment to the Complaint was filed on January 16, 1968 (TR 55-58) in which 40 additional persons were joined as Plaintiffs (TR 56, 57).

The Complaint alleged that the Plaintiffs are natural persons who under the Constitution and the laws of the United States as well as under the treaties in force, are entitled to live their life, retain their liberty and pursue their happiness, and further are entitled to peaceful existence at home and abroad; that they comprise a class too numerous to bring

them all before the Court, and therefore, the issues are presented in the form of a class unit.

The Defendants named in the Complaint were Joseph M. Cullen, District Director of Internal Revenue Service, San Francisco, California, and Sheldon L. Cohen, Commissioner of Internal Revenue Service, Washington, D. C. (TR 4). However, the Order dismissing the Complaint treated it as one amended to name the United States of America as the proper party defendant (TR 59).

The Complaint cites pertinent provisions of the Geneva Declaration of the 21st day of July, 1954, the result of a conference during which the United States of America was present through its representative; that the United States did not join in the Declaration but set forth its position unilaterally stating among others that

> "The Government of the United States being resolved to devote its efforts to the strengthening of peace in accordance with the principles and purposes of the United Nations takes note of the agreements concluded at Geneva on July 20 and 21, 1954 . . . and . . . declares with regard to the aforesaid agreements and paragraphs that (i) it will refrain from the threat or the use of force to disturb them, . . . and (ii) it would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security." (TR 6)

The final Declaration of Geneva provided, among others, that

> "In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July 1956 . . ."

in the territory known as Vietnam (TR 5). That the military juntas operating in the temporarily delineated part of Vietnam known as South Vietnam, supported by the government of the United States, refused to abide by the Geneva Declaration and refused to permit the holding of general elections; that the military juntas in control of the territory known as South Vietnam established a military dictatorship and subjugated its people in contravention to the Geneva Convention; of the laws of its own land and of the precepts of International Law (TR 7).

The Complaint also alleges that the juntas controlling the territory known as South Vietnam disregarded various international treaties to which Vietnam is a party, such as the Convention for the Amelioration of the Condition of Wounded and Sick in the Armed Forces in the Field and at Sea (6 UST 3114; TIAS 3363; 75 UNTS 31) and the Geneva Convention Relative to the Treatment of Prisoners of War (6 UST 3316; TIAS 3364; 75 UNTS 135). (TR 7).

The Complaint also alleges that when a large part of the peoples of South Vietnam rose against the military juntas and a civil war ensued, the United States intervened in violation of the Unilateral Decla-

ration of the United States delivered at the Geneva Convention on July 21, 1954; that such intervention was in violation of the Convention for Pacific Settlement of International Disputes (32 Stat. 1779; TS 392) and in further violation of the Charter of the United Nations (59 Stat. 1031; TS 993) and also in violation of the pertinent provisions of International Law (TR 7).

The Complaint alleged that representatives of those persons in the territory of South Vietnam who are part of the National Liberation Front charged that the Armed Forces of the United States in conjunction with the military forces of the military government controlling South Vietnam committed atrocities against civilians; destroyed civilian property by bombings and burning, and particularly that the Armed Forces of the United States bombed civilian territories contrary to the provision of treaties hereinabove mentioned and to which treaties United States is a party (TR 7, 8).

Allegations were also made that the above representatives charged that the Armed Forces of the United States did invade territory located north of the temporary demarkation line set forth in the Geneva Agreement of 1954, and that the Armed Forces of the United States repeatedly bombed the territory of North Vietnam; that the government of North Vietnam claims that under International Law and particularly under the treaties mentioned, the government of the United States is engaged in the perpetration of war crimes (TR 7-10).

The Complaint also alleges that the acts of the United States are in clear violation of the Geneva Convention of 1945 and further are in violation of Article 33 of the United Nations Charter pertaining to the Convention for Pacific Settlement of International Disputes, as they are in violation of Article 1 of the same charter; that the acts committed by the United States are in violation of the Hague Convention and of the Geneva Convention of 1907 and of the London Treaty of 1954 (59 Stat. 1544; EAS 472; 82 UNTS 279). Particular reference is made to Article 22 of the Hague Declaration of 1899 which provides aerial bombardment for the purpose of terrorizing the civilian population or destroying or damaging private property or injuring non-combatants, is prohibited (TR 14).

The Complaint alleges that the representatives of a National Liberation Force charge that the acts of the United States committed in the territory of Vietnam is in clear violation of the Kellogg Briand Pact (46 Stat. 2343; TS 796; IV Trenwith 5130; 94 LNTS 57).

That the United States became a party of this pact and the same was entered into force on July 24, 1929, and therefore, the United States is bound by the declaration that the parties to the pact

> "condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another."

And that the United States also agreed pursuant to said pact that

> ". . . the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them (the parties to the pact), shall never be sought except by pacific means." (TR 15)

The Complaint also alleges that the London Treaty of 1945 to which the United States is a party, provided for the convening of the Nuremberg War Crime Trials and that the judgment brought in by the Tribunal there found individuals and institutions guilty of war crimes; that the judgment of Nuremberg while finding the General Staff and high command not guilty of war crimes, nevertheless, condemned the organizations because they

> ". . . sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said. Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment." (TR 17)

The Plaintiffs alleged as their belief that the precedent above mentioned makes it mandatory in International Law for all persons not to sit silent, nor be acquiescent when witnessing the commission of acts in violation of International Law and existing treaties. They particularly believe that precedent was established against silence when it was adjudged in Nuremberg that

> ". . . Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification." (RT 18)

The Plaintiffs alleged that under the Constitution of the United States that as citizens they cannot be required to participate in war or in support of war contrary to their conscience; that if they conscientiously object to participation in war in any form they cannot be compelled to participate by contributing to the expenses of the war, and that, therefore, being taxed for war purposes is contrary to law and the Constitution. That they are conscientiously opposed to war in any form, and therefore, they may not be compelled to contribute to the cost of war in Vietnam, and therefore, the Defendant ought to be ordered to reimburse the Plaintiffs for such part of the taxes paid by them for the years 1965-1966 which represents a proportional contribution to the war effort objected to by the Plaintiffs (TR 18, 19).

The Complaint alleges that each of the Plaintiffs filed with the Director of Internal Revenue Service their respective tax return and paid their taxes in full, and that subsequently they filed their Form 843, that being a claim for refund of that part of the taxes which are used for support of the war (TR 20). That the Director of Internal Revenue Service rejected Plaintiffs' claim for refund, and in the Complaint the Plaintiffs listed the amount of their respective taxes for the years 1965 and 1966 and the

respective refund claimed by the Plaintiffs that they are entitled to (TR 21, 22).

The amended Complaint adds on behalf of six of the Plaintiffs the amount of tax paid for 1966 and the amount of refund claimed (TR 55). On behalf of additional Plaintiffs a table shows their respective taxes and their respective refund claim (TR 56, 57).

The prayer of the Complaint asks the United States District Court to enter an Order, declaring Plaintiffs' rights under the Civil Rights Act as well as under the pertinent provisions of the Constitution and the laws of the land, and further prayed for an Order declaring that they are entitled to the refund on such part of their respective taxes paid by them for the years 1965 and 1966 which are expended in support of the war effort in the amount set forth in the table included in the Complaint. They also ask that the Court enter such further Orders which are required in support of the declaration of the Plaintiffs' rights and that the Defendants be required to refund the Plaintiffs such part of the taxes which were described heretofore (TR 22, 23).

The Defendants moved to dismiss the Complaint on the ground that the Complaint failed to state a claim upon which relief can be granted (TR 26).

Pursuant to Notice of Hearing (TR 24) and Stipulation of the Parties (TR 35) and Order of the Court (TR 38) the Motion to Dismiss was heard on January 22, 1968 by the Honorable Alfonso J. Zirpoli, who after hearing argument by counsel, filed his

written Order, dismissing the Complaint and treating the Complaint as one for the refund of taxes only, and treating the parties plaintiff as having standing to sue, and assuming that the Plaintiffs' beliefs of non-payment of taxes for war purposes constitutes a sincere and religious tenet, dismissed the Complaint

> ". . . for failure to state a claim upon which relief can be granted." (TR 59, 60)

Judgment of dismissal was entered accordingly and the Complaint was dismissed with prejudice on January 22, 1968 (TR 61).

Plaintiffs filed their Notice of Appeal (TR 62, 63), Designation of Contents of Record on Appeal (TR 64, 65) and Costs on Appeal (TR 67), and their Statement of Points upon which Plaintiffs-Appellants Rely on Appeal.

III

QUESTIONS INVOLVED

(1) Is a person who is not of draft age but who conscientiously objects to war in any form entitled under the equal protection clause of the Constitution to the same consideration as a conscientious objector of draft age, and therefore, is he to be relieved as Plaintiffs here claim of the payment of that part of the income tax that is used for war and for preparation for war?

Therefore, as a matter of law, the Trial Court erred in dismissing the Complaint on the ground that

it failed to state a claim upon which relief can be granted.

(2) Since Congress saw fit to exempt from military service those of draft age who conscientiously object to participate in war in any form even though others of draft age who do not object are not exempted, would the refusal to exempt objectors beyond draft age from their participation in the war in the form of their tax contribution be such class legislation which is forbidden by the Constitution of the United States?

(3) Is the collection of those parts of the taxes which are used for war purposes from persons who conscientiously object to participation in war not contrary to the First Amendment to the Constitution of the United States in that it is a tax laid specifically on the exercise of those freedoms guaranteed by such Amendment to the Constitution?

(4) Irrespective of the rightness or wrongness of this country's war efforts in Vietnam, the Complaint clearly and without contradiction shows and the Order of the Trial Court so recognized that Plaintiffs sincerely believe that they cannot conscientiously contribute their money for support of that war, and therefore, they stated a cause of action, and the dismissal of the Complaint was an error.

(5) Ought persons such as Plaintiffs who sincerely believe that their tax contribution to the war effort would bring them into conflict with the Nuremberg Judgment and with various treaties to which the United States is a party and would make them a vio-

lator of many provisions of International Law, be given an opportunity to have their tax contribution used for constructive purposes as conscientious objectors of draft age are permitted to do alternate service in lieu of induction?

IV

SPECIFICATION OF ERRORS

(1) The District Court erred in entering the Order, dismissing the Complaint dated January 22, 1968, on the ground that the Complaint failed to state a claim upon which relief can be granted.

(2) The District Court erred when it dismissed the Complaint since it failed to distinguish between those citizens of the United States who can in good conscience contribute to the war effort and those such as Plaintiffs who cannot in good conscience participate in war even to the extent of their tax contribution.

(3) The District Court erred in dismissing the Complaint and holding, in effect, that the recognition of Plaintiffs' civil rights to the extent of exempting them from their tax contribution to the war effort would make their belief superior to the law of the land.

(4) The District Court erred in entering an Order dismissing the Complaint and holding that the recognition of Plaintiffs' rights to conscientiously refuse to contribute to the war effort by paying taxes would be tantamount to cause the destruction of the Repub-

lic and not holding to the contrary, that such recognition could preeminently bring about the preservation of the Republic.

(5) The District Court erred in not holding that the Plaintiffs established *prima facie* that they believe that their contribution to the war effort to the extent of their tax payment may make them responsible under the London Treaty and the Judgment of Nuremberg.

(6) The District Court erred in not holding that the Plaintiffs were entitled, because of their sincere beliefs, to be exempted from contributing to the war effort by paying taxes in support thereof pursuant to the various international treaties and commitments cited in the Complaint.

V

ARGUMENT

Preliminary Remarks

The Order dismissing the Complaint treats it

> ". . . as one for a refund of taxes only. It will treat the parties plaintiff as having standing to sue. And for the purposes of this order the court will assume, without deciding, that the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet."

After so holding, the Trial Court then ordered the Complaint to be dismissed

> ". . . for failure to state a claim upon which relief can be granted."

In doing so the Trial Court distinguished the case of *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870

> ". . . in that the tax here involved is imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live."

The thrust of the Trial Court's Order to Dismiss is expressed in this manner:

> "To permit the avoidance of the payment of income taxes or a portion thereof, which in effect is what plaintiffs seek in this action of refund, would in the language of the Supreme Court in Reynolds v. United States, 95 U.S. 145, 167 (correct citation 98 U.S. 145) 'make the professed (practices) of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.'"

The Trial Court in dismissing the Complaint, concluded that

> "The Framers of the Constitution intended the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof' to serve as a vehicle for the preservation of the Republic and not one for its destruction."

Summary of Argument

The Order dismissing the Complaint and the Judgment of Dismissal with prejudice indicates that the Trial Court in holding that the Complaint failed to state a claim upon which relief can be granted, failed to consider the thrust of Plaintiffs' position for the

sole apparent reason that such a thrust represents a departure from the more classical interpretation of the First Amendment rights. That the Trial Court failed to understand or even recognize the claim of Plaintiffs is indicated by the Trial Court's dismissal of *Murdock v. Pennsylvania,* supra, and its attempt to juxtapose and show a basic contrary holding in *Reynolds v. United States,* 98 U.S. 145, ... S.Ct. .....

The Plaintiffs claim, without contradiction, that they are sincerely opposed to participate in war and in preparation thereof, and because of their objection, they are conscientiously unable to remain silent when part of their federal income tax is used for the preparation of war. The Plaintiffs believe that the First Amendment rights guaranteed to them permits them to refuse to participate in war or in preparation thereof by contributing their taxes therefor, and they further believe that the Court is obligated to extend to them its protection so that their First Amendment rights and the exercise thereof may be secured to them.

The Plaintiffs sincerely believe that their unobjected payment of the taxes would be tantamount to violating the provisions of a great many international treaties to which the United States is a party; that their silent support of a war which they consider immoral (irrespective the rightness or wrongness of their stance) would bring them in head-on conflict with the holding of the Nuremberg Tribunal and further make them violators of certain pertinent holdings of International Law. The Plaintiffs are not asking

that they be given a position where each of them becomes ". . . a law unto himself" but they are simply asking that the First Amendment to the Constitution be given a scope which they believe the Framers thereof intended.

Plaintiffs contend that one, as each of them is, who conscientiously objects to participation in war and in preparation therefor in any form, ought not, and under the Constitution and particularly under the First Amendment thereto cannot, be compelled to contribute to the war effort by forcing him or her to finance such efforts with tax contributions.

Plaintiffs also contend that by contributing their taxes or part of them for purposes of war would deprive them of their status as conscientious objectors to war since clearly such tax payment contributes significantly to the war effort, and in fact, makes such effort possible. Whether or not the recognition of conscientious objection to war is a constitutional right or solely a grant by Congress, the historical fact remains that conscientious objection to war is recognized by Congress (Title 50 App USCA § 45 et seq) and to deprive these Plaintiffs of their classification as conscientious objectors to war while granting such classification to others would present an unconstitutional class legislation.

Plaintiffs further contend that they do not ask that each of them be recognized ". . . a law unto himself." but they are simply asking the Court to declare that as persons of draft age may be exempted from physical draft and in lieu thereof they may do work of

national importance, so should their taxes be set aside for constructive use instead of being used for war purposes.

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(1) THE DISTRICT COURT ERRED IN ENTERING THE ORDER DISMISSING THE COMPLAINT DATED JANUARY 22, 1968, ON THE GROUND THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In dismissing the Complaint with prejudice, the Trial Court distinguished or rather considered inapplicable here the holding of *Murdock v. Pennsylvania,* supra,

> ". . . in that the tax here involved is imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live."

Plaintiffs believe that exactly because the tax here involved is imposed upon them disregarding their conscientious objection to war, and therefore, the holding of the Trial Court is fatally erroneous. Holding as the Trial Court does that a tax that is imposed upon all citizens ". . . regardless of religious practices . . ." is unexceptional and thus proper, runs contrary to all holdings involving the First Amendment to the Constitution. Justice Douglas, speaking for the Court in *Murdock v. Pennsylvania,* supra, said

> "It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional."

Plaintiffs submit that compelling them to contribute part of their taxes to the war effort to which they

conscientiously object is tantamount to placing a tax "... specifically on the exercise of those freedoms ..." which are granted to them by the First Amendment.

Murdock v. Pennsylvania, supra, is not the only case which so holds, but *Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, *Douglas v. City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, and the second decision in *Jones v. City of Opelika,* 319 U.S. 105, 63 S.Ct. 891, all hold that

> "... a tax laid specifically on the exercise of those (First Amendment) freedoms would be unconstitutional."

The *Murdock v. Pennsylvania,* supra, case, vacated the holding of *Jones v. City of Opelika,* 316 U.S. 597, 62 S.Ct. 1239, because in this first *Jones* case the Supreme Court held

> "... when a religious sect used 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the state to charge 'reasonable fees for the privilege of canvassing'. Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital."

The above cases involve religious colporteurs who were convicted of violation of a city ordinance which prohibited the sale of any merchandise within the city limits without a license *(Douglas v. City of Jeannette,* supra, *Murdock v. Pennsylvania,* supra, and the others were Jehovah's Witnesses who went from door to door canvassing literature and soliciting people "to

purchase" certain religious books and pamphlets published by the Watch Tower Bible & Tract Society). All of them were found to be in violation of the ordinance which provided that

> ". . . all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums . . ."

As Justice Douglas said in the *Murdock* case

> "The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds."

The Justice goes on to say that while

> " 'The state can prohibit the use of the street for the distribution of purely commercial leaflets, . . . but . . . They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.' "

As against the holding of the Trial Court that the Plaintiffs are obligated to pay the taxes here involved because the same

> ". . . is imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live."

Justice Douglas in *Murdock* teaches that

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

In line with the above, the Plaintiffs maintain that taxing them equally with those who can conscientiously contribute to the war effort is immaterial because the protection afforded by the First Amendment cannot so be restricted, and that by alleging conscientious objection to finance the war effort by their taxes made out a cause, and therefore, the dismissal of the Complaint with prejudice was in error.

In the case of *Douglas v. City of Jeannette,* supra, the Chief Justice speaking for the Court held that

> "Allegations of facts sufficient to show deprivation of right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth Amendment and to state a cause of action within jurisdiction of federal district court under the Civil Rights Act whenever it appears that the abridgment of the right is affected under color of a state statute or ordinance."

The Complaint here did allege facts sufficient to show that the Plaintiffs were deprived of certain First

Amendment rights and thus the Complaint did state a cause of action as did the complaint in the *Douglas* case.

The Trial Court cited *Reynolds v. United States,* supra, to the effect that the Plaintiffs' conscientious belief cannot be held to be superior to the law of the land because doing so they, as every other citizen, would become a law unto himself. The Trial Court warns with *Reynolds,* supra, that

> "Government could exist only in name under such circumstances."

However, the Trial Court failed to consider the teachings of the Supreme Court of the United States in *United States v. Robel,* ..... U.S. ....., 88 S.Ct. 419 (decided on December 11, 1967). In that case, the Supreme Court held an act of Congress unconstitutional, which act made it unlawful for a member of a Communist-action organization to engage in any employment in any defense facility. The Supreme Court held that the act sought to bar employment both of an Association which may be proscribed and of an Association which may not be consistently proscribed with First Amendment rights. The Plaintiffs submit that while it may be true that the Internal Revenue Code may prevent one to obtain declaratory relief when such relief is directed solely toward the repayment of federal taxes, the Code may not bar the judiciary determination of rights claimed to be protected under the First Amendment of the Constitution even though the Trial Court here so held in reliance on the *Reynolds* case. However, in *Robel*

where the Government attempted to defend the statute that it was passed pursuant to Congress' war power and in support of such defense cited a number of Supreme Court decisions, the Supreme Court stated

> ". . . the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."

The Supreme Court in the *Robel* case cited its decision in *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 426, 54 S.Ct. 231, to the effect that

> "Even the war power does not remove constitutional limitations safeguarding essential liberties."

The Court went on to state that however much the concept of national defense is of importance

> "Yet, this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."

The Trial Court in the case at bar correctly points out that the Framers of the Constitution intended the provision of the First Amendment to serve as a

> ". . . vehicle for the preservation of the Republic and not one for its destruction."

However, the Trial Court failed to ask what kind of Republic did the Framers intend to preserve. Did they intend to pour new wine in the old container and look forward to maintaining the Republic in name only while substituting for the democratic values the concept of totalitarianism? Surely they did not because well nigh for two centuries this country

> ". . . has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment."

Would it not be more than ironic—would it not be tragic to preserve the Republic in name only? We would surely do so, were we to deny the underlying principles on which this Republic was founded.

The Plaintiffs submit that depriving them of the right to conscientiously object and conscientiously refuse to finance a war which they cannot support in good conscience

> ". . . would sanction the subversion . . ."

of one of the First Amendment liberties—one of those liberties

> ". . . which makes the defense of the Nation worthwhile."

The term of preservation of the Republic cannot be invoked as *Robel,* supra, teaches

> ". . . as a talismanic incantation to support . . ."

the deprivation of Plaintiffs' First Amendment rights.

The issues presented by the Complaint ask nothing more than for the Court to determine the line between Government coercion and private freedom. The coercion is applied here vis-a-vis First Amendment rights.

The Courts are to accept this competence to make the determination because the Supreme Court said

> "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated. See Schneider v. State of New Jersey, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L. Ed. 155."

Surely the Complaint presented a justiciable controversy, and in fact, the Trial Court treated the Plaintiffs as having standing to sue. He also assumed though not deciding that

> ". . . the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet."

Since that is so, then it was for the Trial Court to assume jurisdiction and while recognizing the Government's justifiable interest, but holding with *Robel,* supra, to the effect that such interest does not eliminate the need to determine whether

> ". . . the means chosen to implement that governmental purpose in this instance cuts deeply into the right . . ."

of the Plaintiffs to obtain judicial determination of their constitutional rights as protected by the First Amendment.

The Supreme Court in the *Robel* case teaches that Federal Courts ought to be concerned

> ". . . with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake."

The Plaintiffs submit that the Trial Court erred when it failed, as it should have been concerned in accordance with *Robel,* to scrutinize

> ". . . when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. Sheldon v. Tucker, supra; cf. United States v. Brown, 381 U.S. 437, 461, 85 S. Ct. 1707, 1721, 14 L.Ed. 2d 484. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less."

The Plaintiffs submit that because of their uncontradicted claim to the protection of First Amendment rights, Congress must use means which have less than drastic impact on the continued vitality of such freedoms. This is what the Constitution demands and it cannot be negated by relying on the concept of preserving the Republic without asking what that Republic stands for.

Plaintiffs submit that the Order of the Trial Court and the Judgment of Dismissal with prejudice were in error which requires reversal.

(2) THE DISTRICT COURT ERRED WHEN IT DISMISSED THE COMPLAINT SINCE IT FAILED TO DISTINGUISH BETWEEN THOSE CITIZENS OF THE UNITED STATES WHO CAN IN GOOD CONSCIENCE CONTRIBUTE TO THE WAR EFFORT AND THOSE SUCH AS PLAINTIFFS WHO CANNOT IN GOOD CONSCIENCE PARTICIPATE IN WAR EVEN TO THE EXTENT OF THEIR TAX CONTRIBUTION.

One of the apparent reasons for the Trial Court's dismissal of the Complaint may be found expressed in the statement that

> ". . . the tax here involved is imposed on all citizens regardless of religious practices . . ."

However, as Justice Douglas in *Murdock v. Pennsylvania,* supra, said

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted."

The Plaintiffs submit that the genius of the Constitution and the concern of the Bill of Rights and the First Amendment lies in the practice of discrimination and the ability to discriminate between individuals and issues. Again referring to *Murdock v. Pennsylvania,* supra, we point to

> "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital."

So it is vital here to make the distinction between those who can conscientiously participate in war and those such as the Plaintiffs who cannot do so. The Constitution does not brook an attitude which holds that just because some taxpayers support the war

effort by their payment, therefore, others may not claim constitutional privilege against such payment by saying that since the tax here involved is imposed on all citizens regardless of religious practices, and therefore, is wholly proper, takes all meaning away from the rights protected by the First Amendment.

The Plaintiffs submit that the argument so expressed by the Trial Court can be carried *ad absurdum* by saying that the constitutionally protected objection to the war comes into effect only when all citizens object without exception. This kind of nondiscriminatory interpretation of the First Amendment would surely affect

> ". . . the very life of the civil government under which we live."

Such kind of sterile interpretation of the Constitution would positively not serve as a

> ". . . vehicle for the preservation of the Republic . . ."

but to the contrary, would lead to its destruction.

The failure of the Trial Court to make the necessary distinction between those who are unable because of their conscience to finance the war effort and those who are of the contrary belief or who are willing to remain silent, was an error as was the dismissal of the Complaint which requires reversal by this Honorable Court.

(3) THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT AND HOLDING, IN EFFECT, THAT THE RECOGNITION OF PLAINTIFFS' CIVIL RIGHTS TO THE EXTENT OF EXEMPTING THEM FROM THEIR TAX CONTRIBUTION TO THE WAR EFFORT WOULD MAKE THEIR BELIEF SUPERIOR TO THE LAW OF THE LAND.

It is hard, if not impossible, for the Plaintiffs to understand what the Trial Court meant when it held that recognizing their First Amendment rights would

> "'make the professed (practices) of religious belief superior to the law of the land . . .'"

The Plaintiffs do not know which of the laws is invoked—is it the First Amendment to the Constitution or is there some other law which appeared to the Trial Court to threaten the Republic. The Plaintiffs submitted in their Complaint and the Trial Court accepted this claim as true, that they are unable in good conscience to finance the war effort. They were of the belief, and they still are, that the First Amendment shows the way to give recognition to such conscientious belief because as Justice Murphy said in his dissenting opinion in the first *Jones v. City of Opelika* case, and which case was vacated and reversed

> "Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message . . ."

Justice Murphy went on to say in his dissent which later appears to be adopted by the majority that

> "Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights."

Plaintiffs submit that the Trial Court's refusal to grant them their day in Court and preventing them to show if they can that to pay that part of their income tax that is used for the financing of the war effort is a violation of their free exercise of their conscientious approach to life, to man, and to that Supreme Being that some of the Plaintiffs call reverence for life, others call it the inner spirit—but all call it concern for human life.

The Plaintiffs submit that the Trial Court erred in dismissing the Complaint because it is the task of the Courts to remember what Justice Douglas said in *Girouard v. The United States of America,* 328 U.S. 61, 66 S.Ct. 826,

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power

> higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

Plaintiffs believe that the Trial Court failed to recognize that in the domain of conscience, there is a moral power higher than the State, and because of that it failed to inquire whether the exacting of war taxes from the Plaintiffs was in fact an accommodation of the demands of the State to the conscience of the Plaintiffs. As it was said in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178,

> "Freedom of thought which includes freedom of religious belief is basic in a society of free men."

While it may be true that compelling the Plaintiffs to make financial contribution to the war effort may be the means or the vehicle for the "preservation of the Republic" but it will surely not lead to the preservation of "a society of free men." which was and is the underlying concept of the Constitution.

The First Amendment supports the claim of the Plaintiffs, and therefore, the dismissal of the Complaint was erroneous and a reversal is required.

(4) THE DISTRICT COURT ERRED IN ENTERING AN ORDER DISMISSING THE COMPLAINT AND HOLDING THAT THE RECOGNITION OF PLAINTIFFS' RIGHTS TO CONSCIENTIOUSLY REFUSE TO CONTRIBUTE TO THE WAR EFFORT BY PAYING TAXES WOULD BE TANTAMOUNT TO CAUSE THE DESTRUCTION OF THE REPUBLIC AND NOT HOLDING TO THE CONTRARY, THAT SUCH RECOGNITION COULD PREEMINENTLY BRING ABOUT THE PRESERVATION OF THE REPUBLIC.

The Trial Court in its Order, dismissing the Complaint, stated that

> "To permit the avoidance of the payment of income taxes or a portion thereof, which in effect is what plaintiffs seek in this action for refund, . . . Government could exist in name under such circumstances."

In emphasizing its misgivings, the Trial Court goes on to speak of the dire consequence of enforcing Plaintiffs' Constitutional right under the First Amendment as being the possible destruction of the Republic.

Looking upon the long history of the Bill of Rights as reported in the decisions of the Supreme Court and particularly the ever increasing respect shown for individual rights, one may be pacified that the honoring of the fundamental rights guaranteed by the First Amendment did, in fact, strengthen the Republic, and withal, by defending those values and ideals, this Nation was set apart from those which succumbed to the totalitarian ideology and to the paramountcy of the State over the individual. The refusal to subvert the liberties of the individual protected by the First Amendment is the force propelling the in-

dividuals to defend the Nation as being worthwhile to defend.

Plaintiffs submit that one can serve one's country other than by means of weapons, and in fact, they submit that upholding the ideals implicit in a democratic concept is a way to engage in the defense of one's country.

The Plaintiffs are supported in this contention by the highly respected opinion of those who gave their concern to the study of the basic documents of this country. The late Justice Cardozo wrote that the First Amendment embraces

> ". . . a domain of free activity that may not be touched by government or law at all . . . By express provision of the constitution, (the individual) is assured freedom of speech and freedom of conscience or religion. These latter immunities have thus the sanctions of a specific pledge." (The Paradoxes of Legal Science, p. 98 (1928).)

The late venerable Professor Meiklejohn was teaching us that while other constitutional provisions may be intended to strike a balance between authority and liberty, in the First Amendment the founders of the Republic placed all their weight on the side of liberty. The Constitution, says Professor Meiklejohn

> ". . . does not give equal status to the duty of self-preservation and the duty of maintaining Political Freedom. On the contrary, our 'experiment' in self-government makes that freedom an absolute." (Meiklejohn, "What Does the First Amendment Mean?" 20 University of Chicago Law Review, pp. 461, 479 (1953).)

While it is true that Professor Meiklejohn was not a lawyer which may be considered by some as a disadvantage but by others as an advantage, he was, nevertheless, supported in his interpretation of the Constitution by judges clearly trained to interpret that document. Justice Black echoed Professor Meiklejohn and said that the First Amendment provides that "Congress shall make no law" abridging the freedoms of religion, speech, press and assembly therein guaranteed,

> "Neither as offered nor adopted is the language of the Amendment anything less than absolute." (Justice Black, The Great Rights, p. 54 (Cahn, ed., 1963).)

Justice Douglas of the Supreme Court of the United States, speaking of the language in the First Amendment, believed that it expressed

> "The mandate is in terms of the absolute . . . The prohibition is all-inclusive and complete. The word 'no' has a finality in all languages that few other words enjoy." (Douglas, We the Judges, p. 307 (1956).)

The Plaintiffs submit that even those who do not accept the concept of absolute when speaking of the First Amendment agree that it incorporates rights so basic

> ". . . that neither liberty nor justice would exist if they were sacrificed." (*Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937).)

However, either dissenting or concurring, the Justices of the Supreme Court agree

> ". . . that the First Amendment is the keystone of our Government, . . ." (Justice Black dissenting, in *Dennis v. United States,* 341 U.S. 494, 580, 71 S.Ct. 857 (1951).)

They also agree that the rights guaranteed by the First Amendment are

> ". . . basic and fundamental, and . . . so important to the preservation of the freedoms treasured in a democratic society." (*Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476 (1965).)

West Virginia Board of Education v. Barnette, supra, expresses clearly the basic difference between the constitutionality of governmental action which may infringe upon the right of property and action limiting or impinging upon First Amendment rights. The Supreme Court said

> "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."

The *Barnette* case also stands for the proposition that First Amendment rights

> ". . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

The Plaintiffs submit that there is no showing and the Trial Court failed to ask for such showing by the Defendant that making use of Plaintiffs' tax payment for constructive purposes would bring about

grave and immediate danger to the interest of the United States.

They also submit that they have the right under the Constitution to choose as they conscientiously are propelled to do, to support peaceful means of defense. The First Amendment guarantees to them the right to stand on their conscientious objection to finance a war which they cannot support, and therefore, the dismissal of their Complaint was in error which this Court ought to rectify by reversing the judgment of the Trial Court.

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(5) THE DISTRICT COURT ERRED IN NOT HOLDING THAT THE PLAINTIFFS ESTABLISHED PRIMA FACIE THAT THEY BELIEVE THAT THEIR CONTRIBUTION TO THE WAR EFFORT TO THE EXTENT OF THEIR TAX PAYMENT MAY MAKE THEM RESPONSIBLE UNDER THE LONDON TREATY AND THE JUDGMENT OF NUREMBERG.

From the Order dismissing the Complaint, it is clear that the Trial Court held that the Plaintiffs established *prima facie* that they are holding to their beliefs sincerely and that their belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet. The Court did not, and likely could not hold that such religious tenet is held by the Plaintiffs in the orthodox sense, but undoubtedly was held to be a religious tenet as defined in *United States v. Seeger,* 380 U.S. 163, 85 S.Ct. 850 (1965). There, Justice Clark, speaking for the Court, said that the test may be expressed,

> "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . ."

Justice Clark also pointed out that the above conclusion

> ". . . avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."

Congressional intent, as the Plaintiffs submit, may be seen from the wording of Title 50 USCA App. § 451, which states that

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

The above Title also says that if a person

> ". . . is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his Local Board to perform . . . such conscientious work contributing to the maintenance of the national health, safety or interest as the Local Board may deem appropriate."

The Plaintiffs argue that unless one intends to impute to Congress an intent to classify such religious belief exempting some and excluding others, then the Plaintiffs are entitled to have their opposition to war in any form respected. In line with Title 50, supra, Plaintiffs, under these circumstances, may be called

upon that in lieu of their tax payment for financing the war they should in some manner contribute

> ". . . to the maintenance of the national health, safety or interest . . ."

In line with the requirements of Title 50, and as the Order of the Trial Court shows, Plaintiffs were found to be conscientiously opposed to war in any form, and thus they were entitled to the granting of their prayer set forth in their Complaint.

Plaintiffs submit that they did establish *prima facie* that they are opposed to war in any form and further established without any contradiction that they truly believe that remaining silent and not opposing the war, will expose themselves to the charge of being guilty of violating the many provisions of Treaties to which the United States is a party, and also pertinent holdings of international law, among others the judgment of the Tribunal of Nuremberg. At this point, the Plaintiffs want to emphasize, as they did in their Complaint, that neither the Trial Court nor this Court are asked to determine the legality or illegality of the Vietnam or any other war. The only determination that they were asking is whether or not they, the Plaintiffs, hold sincerely said beliefs against their participation in war. Because of the Trial Court's holding as to the sincerity of Plaintiffs' belief and that their belief partakes of the character of religious tenets, the Plaintiffs were entitled to a declaration of their rights and to their day in Court. The denial by the Trial Court of both requires a reversal.

(6) THE DISTRICT COURT ERRED IN NOT HOLDING THAT THE PLAINTIFFS WERE ENTITLED, BECAUSE OF THEIR SINCERE BELIEFS, TO BE EXEMPTED FROM CONTRIBUTING TO THE WAR EFFORT BY PAYING TAXES IN SUPPORT THEREOF PURSUANT TO THE VARIOUS INTERNATIONAL TREATIES AND COMMITMENTS CITED IN THE COMPLAINT.

Plaintiffs alleged in their Complaint and in support thereof argue now that whatever national interest may require and whatever proper means Congress may adopt to secure those requirements, the denial of the Plaintiffs' First Amendment rights is not one that can square with the Constitution nor with the international treaties to which United States is a party and with the various declarations made in support of such treaties. As it was said in *Robel,* supra,

> ". . . Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."

We do not believe that Congress intended or that the Constitution would permit such an intent to be carried out if it were to be opposed to the First Amendment rights of all the Plaintiffs. The Trial Court should have held that the Plaintiffs are exempted to contribute to the financing of the war effort because of their honestly held beliefs; that the international treaties and commitments represented a compelling force upon them.

The Trial Court erred because irrespective whether there is an immediate danger of any punishment being meted out to those who violate international treaties and International Law, nevertheless, the Supreme Court of the United States ever since *Ex*

parte Quirin, 317 U.S. 1, 63 S.Ct. 2, and before that defined and held punishable

"Offenses against the Law of Nations."

Plaintiffs submit that the law applied to Admiral Yamashita may be applied to them too because in that case, *Application of Yamashita,* 327 U.S. 1, 66 S.Ct. 340, Chief Justice Stone, speaking for the Court held that an action of troops

> ". . . whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent."

Admiral Yamashita was punished because International Conventions

> ". . . plainly imposed on petitioner (an alien commander of alien troops in war) who at the time specified was military governor of the Philippines as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."

Plaintiffs submit that they recognize their obligation and truly believe that their duty is to abide by this obligation. It is clear to them that they had the affirmative duty to take such measures as were within their individual power. One of these measures is not to remain silent when they are called upon to contribute financially to the war effort, which effort they cannot conscientiously support.

The failure of the Trial Court to recognize and its failure not to hold that the Plaintiffs are exempt from the financing of the war effort, which they conscientiously oppose in any form, was a prejudicial error which requires reversal.

VI

CONCLUSION

For the foregoing reasons, the Order and the Judgment of the trial Court should be reversed.

Dated, Carmel, California,
July 22, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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